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The Plight of the American Musician: A Study of Comparative Copyright Law and Proposed Performers' Protection Act

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THE PLIGHT OF THE AMERICAN MUSICIAN: A STUDY OF COMPARATIVE COPYRIGHT LAW AND PROPOSED PERFORMERS' PROTECTION ACT

*By Gary A. Greenberg**

INTRODUCTION

"Being a musician has probably never been more difficult than it is today."[1]

The difficulty facing musicians is the result of a lack of employment opportunities available, at reasonable rates, for musicians performing music in the United States today.[2] Ironically, sound recordings are the primary culprits.[3] This extraordinary sociological problem has been recognized and effectively controlled in Great Britain for some time. However, the United States continues to sing a sour song of short term profits and long term neglect for this problem.

This article does not address the question of whether the United

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1. Fong-Torres, *Sell Out or Ship Out*, San Francisco Chron., Jan. 13, 1985 (Datebook Section), at 19, col. 2 (statement of Bobby Corona, manager and club owner of The Stone in San Francisco, California).

2. The following statistics are an alarming indication of the seriousness of the problem. More than one-third of the members of the American Federation of Musicians ("A.F. of M.") were unemployed in 1976 or had incidences of unemployment. *See Copyright Office Hearings on Performance Rights*, reported in Subcom. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm., 95th Cong., 2d sess., Performance Rights in Sound Recordings 15 (Comm. Print 1978) ("HEARINGS") (statement of Sanford Wolff, national secretary for the American Federation of Television and Radio Artists, based on a study by the Department of Labor). One-third of the musicians in the A.F. of M. earned less than $7,000 in 1976 and over half earned less than $13,000. *Id.* (statement of T. Miles, owner and publisher of The Hollywood Reporter). The average amount earned by a recording session musician paid union scale in 1976 was $1,707. *Id.* (statement of Victor Fuenteabella, president of the A.F. of M.). It may fairly be assumed that these statistics show even lower rates of pay for the large number of non-union performing musicians or union members who perform for less than scale. *See* S. SCHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 51 (2d ed. 1977).

3. *See infra* text accompanying notes 112-18.

States Copyright Act[4] should be amended to provide for performance rights in sound recordings.[5] Instead, it focuses on a truly unique approach to the problem of protection for performers currently in place in Britain.

This article examines the ways in which Britain safeguards the interests of its musicians and the socio-economic justifications and benefits which underlie its policies. Ultimately, the article will argue for the implementation of similar policies in the United States and will discuss methods of accomplishing this goal.

AMERICAN PROTECTION OF MUSICAL WORKS AND SOUND RECORDINGS

United States copyright law derives from the Constitution, which authorizes Congress to grant exclusive rights to authors in their writings in order to promote the useful arts.[6] The bundle of exclusive rights given to copyright owners by the 1976 Copyright Act includes the right to reproduce, publicly display or perform, publicly distribute and prepare derivations of a copyrighted work.[7] These rights, however, are not always unlimited in scope and may be subject to exemptions and limitations depending, among other things, upon the nature of the copyrighted work and the use to which it is put.[8]

With regard to non-dramatic musical works and sound recordings, the 1976 Copyright Act imposes specific limitations upon the scope of exclusive rights given. For example, once a non-dramatic musical work is recorded and distributed to the public with the copyright owner's permission, others are free to record the work and to distribute phonorecords embodying the work to the public, subject only to their paying a royalty to the copyright owner on every record made and distributed.[9] The royalty rate can either be negotiated voluntarily or imposed statutorily. This is commonly referred to as a "compulsory mechanical license," and is designed to insure the public's access to music.[10]

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4. 17 U.S.C. § 101 *et. seq.* (1982)

5. For a full discussion of this topic, see Hayes, *Performance Rights in Sound Recordings: How Far to the Horizon?*, 27 COPYRIGHT LAW SYMP. (ASCAP) 113 (1982). *See also* Urwin, *Paying the Piper: Performance Rights in Musical Recordings*, 5 COM. & LAW 3, (Winter 1983).

6. U.S. CONST. art. I, § 8, cl. 8.

7. 17 U.S.C. § 106 (1982).

8. The most notable general limitations are the "not-for-profit" exclusions found in 17 U.S.C. §§ 108, 110 and 112, and the doctrine of "fair use" as described in 17 U.S.C. § 107 (1982).

9. 17 U.S.C. § 115 (1982).

10. The compulsory license includes the privilege of making an arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performer

There is no compulsory license for sound recordings and unauthorized duplication of a copyrighted recording is prohibited.[11] However, others are permitted to produce a new recording of the music on a sound recording so long as it is independently produced.[12]

As with non-dramatic musical works, the 1976 Copyright Act also limits the exclusive rights granted to the owner of a copyright in a sound recording. Prior to 1972, phonorecords were not accorded copyright protection at all. This forced producers to seek protection for their sound recordings under common law doctrines of property and unfair competition and, in an increasing number of states, under specific criminal anti-piracy statutes.

New York pioneered these protections in the 1950's by applying a misappropriation theory of protection for sound recordings. The leading case was *Metropolitan Opera Association, Inc. v. Wagner-Nichols Recorder Corp.*,[13] in which a preliminary injunction was granted to prevent the unauthorized offering to the public of recordings of opera performances recorded off the air. Following the *Metropolitan Opera* case, the Second Circuit concluded that New York law recognized an exclusive right in a record producer to make and sell its records and prohibited unauthorized duplication even of public domain compositions.[14] The 1976 Copyright Act permits common law protection only for recordings fixed before February 1972.[15]

The misappropriation theory of protection opened the way for states to enact specific anti-piracy statutes for phonorecords. Perhaps the most notable is California Penal Code Section 653(h), which makes it a misdemeanor to make an unauthorized duplication of a sound recording with intent to sell it.[16] The statute was declared constitutional by the United States Supreme Court in *Goldstein v. California*[17] and almost all states

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provided that the arrangement does not alter the basic melody or fundamental character of the work. 17 U.S.C. § 115(a)(2) (1982). In addition, the arrangement does not entitle the licensee to protection of the work as a derivative work without the copyright owner's permission. *Id.*

11. 17 U.S.C. § 106(1) (1982).

12. 17 U.S.C. § 114(b) (1982).

13. 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *preliminary injunction aff'd per curiam* 297 A.D. 632, 107 N.Y.S.2d 795 (1951).

14. Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 662 (2d. Cir. 1955).

15. 17 U.S.C. § 301(c) (1982). For discussion of the continued vitality of such protection in New York, see Mowrey, *The Rise and Fall of Record Piracy*, 27 COPYRIGHT L. SYMP. (ASCAP) 155, 193-94 (1982). *See also* Lone Ranger Television, Inc. v. Program Radio Corp., 740 F.2d 718 (9th Cir. 1984) (recognizing an intangible property interest in performances on tape).

16. CAL. PENAL CODE § 653(h) (West Supp. 1986).

17. 412 U.S. 546 (1973).

now have similar statutes.[18] These statutes, however, apply only to recordings fixed before February 1972.[19] Recordings made after that date are governed exclusively by the 1976 Copyright Act.[20] February 15, 1972, is the official date on which Congress amended Title 17's provisions to create a new limited copyright in sound recordings fixed, published and copyrighted on or after that date.[21]

Under the 1976 Copyright Act, the owner of the copyright in a sound recording has the exclusive right to make phonorecords embodying the recording and to distribute them to the public.[22] However, since the musical compositions embodied in the sound recording are separate works of copyright, the producer must pay songwriter royalties for the mechanical use of the songs, unless the producer also owns those rights.[23] In addition, since the 1976 Copyright Act specifically excludes any right of performance in phonorecords, the owner of the copyrighted sound recording is not entitled to prohibit the playing of phonorecords embodying the recording in public, nor is he entitled to a royalty in that respect.[24] For example, the commercial use of phonorecords by radio broadcasters and discotheque operators creates no direct income for the record company, which generally derives income solely from retail sales.

The 1976 Copyright Act confers no rights on recording artists for their performances. Recording artists who are not also songwriters must rely on contractual payments, in the form of record company allowances, as the sole return on their artistic efforts.[25] Artists may also negotiate for a percentage of the record company's retail sales.[26] However, this percentage tends to be small and usually is not payable until the record company has recouped all of its fees and costs associated with the production and distribution of the record.[27] In addition, restrictive contractual provisions like cross-collateralization of costs between records and reduced artist royalties on certain sales further reduce the actual percentage. The result is that most recording artists never see royalty checks from the

18. *See* BROWN, CASES ON COPYRIGHT 565 (3d. ed. 1978).

19. 17 U.S.C. § 301(c) (1982).

20. *Id.*

21. Act of Oct. 15, 1971, Pub. L. No. 92-140, 1971 U.S. CODE CONG. & ADMIN. NEWS (85 Stat. 391) 417 (1971), *superseded by* 17 U.S.C. § 114 and § 301(c) (1982).

22. 17 U.S.C. § 106 (1982).

23. 17 U.S.C. § 114 (1982).

24. *Id.*

25. *See* I.G. ERICKSON, E. HEARN & M. HALLORAN, MUSICIAN'S GUIDE TO COPYRIGHT 58 (rev. ed. 1983).

26. *Id.* at 58.

27. *Id.* at 59-60.

commercial exploitation of their recorded performances.[28] This situation occurs despite the healthy profits generated each year by record use.[29] The harshness of this result has been pointed out by several commentators, perhaps never more eloquently than by Barbara Ringer, the Register of Coyrights:

> I think it is unfair that individual performers have rarely received any of the benefits from the great technological developments that have, to a large extent, wiped out their profession. Fairness indicates that it is wrong that they not get paid for performances of their works.[30]

Numerous attempts have been made in Congress to remedy the problem of inadequate compensation for performers through proposals to introduce performance rights in sound recordings into United States copyright law. To date, the broadcast industry has been successful in opposing these attempts. As one commentator recently put it, "performance rights remain a pipe dream unable to break out of a fifty year deadlock."[31]

There have, however, been two major efforts to advance performance rights in the last twenty years. The first occurred between 1967 and 1974 as part of the process associated with the general revision of the 1909 Copyright Act.[32] It involved a proposal, or more accurately, a series of proposals to include performance rights in records in the 1976 Copyright Act subject to compulsory licensing with royalties to be divided equally between record companies and recording artists.[33] The proposal was ultimately knocked out of the final version of the bill passed by Congress in 1974.[34]

As a compromise to proponents of the bill, section 114(d) was added to the 1976 Copyright Act calling for the Register of Copyrights to research the question and to report to Congress with recommendations.[35] Barbara Ringer, the Register of Copyrights, submitted the Register's report in 1978 and strongly recommended adoption of the right.[36] She pro-

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28. *Id.*

29. For example, it is estimated that sound recordings accounted for $1.9 billion in radio advertising revenue in 1977. HEARINGS, *supra* note 2 (statement of T. Mills).

30. Ringer, *Copyright in the 1980s*, 23 BULL. COPYR. SOC. 299, 305 (1976).

31. Urwin, *supra* note 5, at 49.

32. The proposal was fashioned by Senator Williams in 1967 and first appeared before Congress as S. 543, 91st Cong., 2d Sess., 115 CONG. REC. 1382 (1969). For a full discussion of the legislative history of this effort, see generally, Hayes, *supra* note 5.

33. *See* BROWN, *supra* note 19, at 567-68.

34. *See* Ringer, *supra* note 30, at 305.

35. 17 U.S.C. § 114(d) (1982).

36. *See* HEARINGS, *supra* note 2 (full text of Register's report to Congress).

posed amending section 114 to provide for performance rights subject to compulsory licensing with royalties to be split equally among performers, including employees for hire, and producers as joint authors.[37] Of particular interest was her finding that payment of performance royalties would not disrupt the broadcasting industry, adversely affect programming, nor drive marginally profitable stations out of business.[38]

This led to the second major effort in Congress. This occurred between 1977 and 1982. It centered around a bill introduced in the House of Representatives.[39] Like its predecessor, H.R. 997 proposed amending the 1976 Act to provide for performance rights in sound recordings. The proposal called for flat fees to be paid by radio and television stations based on a percentage of their gross advertising revenue, a fee of one dollar for jukebox operators, a fee of one hundred dollars for dance establishments, and a flat fee of twenty-five dollars for all other users except television stations with receipts under one million dollars and public broadcast stations.[40] The method of distribution was to be determined by the Copyright Royalty Tribunal with half of the royalties going to the copyright owner and half to be shared among the recording artists.[41] Hopes ran high among proponents of the bill, but repeated delays in Congress have turned these expectations into pessimism about the future of the proposal.[42]

THE BRITISH SYSTEM OF PROTECTION

By contrast, statutory protection for phonorecords has existed in Great Britain since 1911.[43] Curiously, the right was not exercised until

37. *Id.*

38. *Id.*

39. The bill was first introduced as H.R. 6063, 95th Cong., 1st Sess., 123 CONG. REC. 10,463 (1977). *See* 24 BULL. COPYR. SOC. 428 (1977). It was suspended pending the report of the Register of Copyright. It was reintroduced as H.R. 997, 96th Cong., 1st Sess., 125 CONG. REC. 461 (1979). *See* 27 BULL. COPYR. SOC. 223 (1980). An identical bill was introduced in the Senate at that time as S. 1552, 96th Cong., 1st Sess., 125 CONG. REC. 20,032-35 (1979). 27 BULL. COPRY. SOC. at 229 (both bills will hereinafter be referred to as H.R. 997).

40. *Id.* at 241.

41. *Id.* For criticism of H.R. 997, *see infra* text accompanying notes 124-125.

42. *See* Billboard, Nov. 14, 1982, at 46; also reported in 29 BULL. COPYR. SOC. 452 (1982). For a full discussion of the legislative history of H.R. 997, see generally Urwin, *supra* note 5.

43. The 1911 Act provided that "copyright shall subsist in records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works. . . ." Copyright Act 1911, 1 & 2 Geo. 5, ch. 46, § 19, sched. 1; *superseded by* Copyright Act 1956, 4 & 5 Eliz. 2, ch. 74 § 12, sched. 11 ("The 1956 Copyright Act").

1934. In *Gramophone Co. v. Stephen Carwardine Ltd.*,[44] the Gramophone Company of England sued the proprietors of a restaurant for the unauthorized performance in public of a sound recording manufactured by them. The *Carwardine* case established that the owner of the copyright in a phonorecord is the owner of the sole right to use that record for a performance in public and that the record makers were entitled to a royalty in that respect by virtue of the 1911 Act.[45]

The decision has never been appealed or reversed.[46] In fact, the holding was adopted and broadened by Parliament in the 1956 Copyright Act. Under this statute, the acts restricted by copyright in a sound recording include making a record embodying the recording, causing the recording to be heard in public, and broadcasting the recording.[47] Under the 1956 Act, the "maker" of a phonorecord is entitled to copyright.[48] "Maker" is defined as the person who owns the first record embodying the recording.[49] Therefore, since 1934, the British record industry has exercised its right to license the broadcasting and public performance of its records.[50]

PERFORMING RIGHT SOCIETIES

Fueled by the *Carwardine* decision, record companies set up a performing right society in 1934 called Phonographic Performance Ltd. ("PPL") to administer the new right.[51] The existence of a performance right in favor of record manufacturers was unique to Britain at the time.[52] In an effort to lobby other governments to introduce performing rights in records into their laws, the record manufacturers set up an international pressure group called the International Federation of the Phonographic Industry.[53] The Federation met with some success, but faced staunch opposition, most notably from the United States, which continues to exclude performing rights in records from its laws.

Thus, users of phonorecords for public performance in the United

44. [1934] Ch. 450.

45. *Id. See also* G. MCFARLANE, COPYRIGHT: THE DEVELOPMENT AND EXERCISE OF THE PERFORMING RIGHT 132, 136 (1980).

46. *Id.*

47. 1956 Copyright Act § 12(5).

48. *Id.*

49. *Id.* at § 12(8).

50. *See* PERFORMING RIGHT SOCIETY, PERFORMING RIGHT YEARBOOK: 1984-1985 56 (1984).

51. *See* MCFARLANE, *supra* note 45, at 13.

52. *Id.*

53. *Id.* at 136. Fifty-one nations currently recognize the performance right to some extent. *See* HEARINGS, *supra* note 2.

States today are required to be licensed only by the performing right organizations that license music on behalf of composers and publishers. The two primary organizations are the American Society of Composers and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"). As the names indicate, ASCAP is an unincorporated association whose members are composers and publishers, while BMI is a non-profit corporation owned and operated by the radio broadcast industry.[54] A third less prominent organization represents European stage authors and composers.[55]

Despite these structural differences, all three organizations perform essentially the same function. They act as clearinghouses for owners of music copyrights by issuing bulk licenses to users on an annual basis.[56] These blanket licenses entitle the licensee to unlimited access to all of the music in the societies' repertoire.[57] The licenses do not distinguish between types of use, that is, performances by live musicians and performances by mechanical reproduction.[58] Radio and television broadcasters typically pay a fee based on a percentage of their annual receipts from the sale of air time, whereas club owners typically are assessed a flat fee depending upon the size and nature of the establishment.[59]

By contrast, a public user of phonorecords in Britain must be licensed both by the Performing Rights Society ("PRS"), which represents composers and publishers, and by PPL, which represents record producers.[60] In administering the performance right on behalf of producers in Britain, PPL has demonstrated considerable social responsibility.

ADMINISTRATION OF THE BRITISH SYSTEM

As previously discussed, Phonographic Performance Ltd. was set up in 1934 by the British recording industry to control the broadcasting and public use of their recordings and to issue licenses for those purposes.[61]

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54. For a description of the structure of these organizations, see Buffalo Broadcasting v. American Soc'y of Composers, Authors and Publishers, 546 F. Supp. 274, 277 (S.D.N.Y. 1982).

55. *See* BROWN, *supra* note 18, at 406.

56. *See, e.g., Buffalo Broadcasting*, 546 F. Supp. at 277.

57. *Id. See also ASCAP: Going Like 61,* ASCAP Today, Spring 1975, at 19.

58. *See* BROWN, *supra* note 18, at 407.

59. *Id.*

60. British licensees have complained about having to pay twice for essentially the same right. However, this argument has been rejected on the grounds that "the licenses are for entirely different purposes." J. WHITFORD, COPYRIGHT AND DESIGNS LAW: REPORT OF THE WHITFORD COMMITTEE TO CONSIDER THE LAW OF COPYRIGHT AND DESIGNS 101 (1978).

61. PHONOGRAPHIC PERFORMANCE LTD., GENERAL HISTORICAL INFORMATION, BROADCASTING AND PUBLIC USE OF SOUND RECORDINGS.

Instead of exploiting the right purely for profit, PPL's member producers[62] have administered the right in large part for the benefit of recording artists and live musicians. For example, like most performing right organizations, PPL is a non-profit organization that is operated for the benefit of its members.[63] However, the revenue collected from license royalties is not distributed exclusively among the record companies; instead, ex gratia payments, amounting to almost half of PPL's net distributable income, are made to recording artists, musicians and copyright owners.[64]

PPL also enforces a policy, through licensing, which is designed to protect the livelihood of recording artists and performing musicians.[65] PPL's policy with regard to musicians was formulated in the early 1950's when record use started to expand together with broadcasting.[66]

PPL maintained that the unrestricted commercial exploitation of phonorecords threatened to seriously reduce and in some cases entirely eliminate employment opportunities available to live musicians.[67] To avert this threat, PPL enacted a policy of limiting the licenses it granted to radio broadcasters and commercial establishments that use phonorecords as specially featured musical entertainment.[68]

With regard to the latter type of user, PPL enforces a truly unique policy of requiring them to put on a reasonable ratio of live music, wherever possible, as part of their license.[69] In other words, before a commercial establishment, such as a discotheque or dance hall, can obtain a license to play phonorecords in PPL's repertoire, it must agree to employ live musicians according to a schedule determined under the license.[70]

Of course, not every commercial user of recorded music is required to be licensed by either PPL or the PRS. This is because British copyright law, like United States copyright law, exempts certain private or quasi-domestic performances from what would otherwise be an infring-

62. In 1980, there were approximately 135 member companies. *See* LADDIE, PRESCOTT & VICTORIA, THE MODERN LAW OF COPYRIGHT 471 (1980).

63. Phonographic Performance Ltd., *supra* note 61, *The Licensing Body.*

64. When PPL was established, the basis of distribution was twenty percent of the net distributable income for the benefit of recording artists, twelve percent for the musician's union and a further ten percent for the music publishers. MCFARLANE, *supra* note 45, at 132, 133.

65. Letter of Anthony Brand, PPL licensing agent (Feb. 12, 1985).

66. *Id.*

67. PHONOGRAPHIC PERFORMANCE, *supra* note 61, *Records and Musicians: The Sociological Problem Explained.*

68. Brand, *supra* note 65.

69. *Id.*

70. The schedule appears on the face of the license and describes the specific days and hours when phonorecords may be played as specially featured musical entertainment.

ing act; namely, causing sound recordings to be heard in public.[71] It should be noted, however, that British courts have demonstrated a reluctance to apply the exemption in cases where it would unreasonably deprive the copyright owner of compensation.[72] Therefore, the term "in public" is generally given a broad definition by British courts.[73] It should also be noted that performance of a sound recording which occurs through the reception of a broadcast by the British Broadcasting Corp. ("BBC") or the Independent Broadcasting Authority is not an infringement of the copyright in the sound recording.[74] This does not apply to the underlying music on the record which, as in the United States, is protected in these circumstances and must be licensed by the PRS.[75]

In addition to the statutory exemption available for private or quasi-domestic performances, PPL itself exempts certain establishments from the requirement to employ live musicians, especially where the music they provide is background music only.[76] In this regard, the licensee must reach an agreement with the musicians' union which has the primary responsibility for determining the terms of a given license.[77] The musicians' union in Britain is fairly active in the record industry since most recording artists are members in what tends to be a "closed shop" set-up.[78] According to PPL, there are no set guidelines and each case is taken on its merits.[79] Basically, the exemption appears to be available where the establishment is not using phonorecords to displace live musicians, but rather is unable to employ them due to factors such as the size, nature and location of the establishment.[80]

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71. 1956 Copyright Act, § 12(7)(a). *See, e.g.,* Phonographic Performance Ltd. v. Pontin's Ltd. [1968] Ch. 290.

72. *See, e.g.*, Performing Rights Soc'y v. Harlequin Record Shops Ltd. [1979] 1 W.L.R. 851, *also reported in* [1979] 2 All E.R. 828.

73. *Id. See also* Performing Rights Soc'y v. Rangers Supporters Club [1975] R.P.C. 626; South African Music Rights Org. v. Trust Butchers Ltd. [1978] 1 S.A. 1052.

74. 1956 Copyright Act § 40(1).

75. *See* WHITFORD, *supra* note 60, at 97. Thus, the playing of a radio in public for the entertainment of patrons when a record program is being broadcast is not an infringement of the copyright in the records. The radio station, as the originator of the programming, must still be licensed by PPL, but not the establishment owner.

76. *Id.* at 102.

77. *Id.* at 101.

78. Letter of Anthony Brand, PPL licensing agent (Mar. 30, 1985). A "closed shop" set-up is one in which the employer agrees to hire only union members and to discharge any employee who fails to maintain union membership. *See* H. LADDIE, CASES AND MATERIALS ON LABOR LAW 70 (2d. ed. 1979). This would indicate that the musicians' union in Britain exercises significant control over the music work force there. This is not the case in the United States. *See* SCHEMEL & KRASILOVSKY, *supra* note 2, at 51.

79. Brand, *supra* note 78.

80. *Id.*

The same considerations are taken into account in determining what constitutes a reasonable ratio of live music for a licensee who is determined to be capable of complying with the requirement.[81] As an example, a discotheque operating in an urban area typically would be required to employ musicians three nights per week where the club has applied for record use on six or seven nights per week.[82] In deciding what is reasonable, PPL refers to information provided by the applicant regarding, among other things, the club's frequency of operation, average attendance, and admission prices.[83]

Licensees who feel that the terms of a license are unreasonable, or that the refusal to issue a license except on certain terms is unfair, may petition the Performing Right Tribunal ("PRT") for a determination.[84] The PRT was set up as part of the 1956 Act.[85] It has jurisdiction to hear disputes between licensing bodies and persons requiring licenses.[86] The process is relatively informal and inexpensive.[87]

The PRT sits on a part time basis and less than a score of judgments have been rendered since its inception.[88] This attests both to the effectiveness of the PRT as an administrative body and to the fairness of PPL's policies, which are fashioned so as to avoid PRT involvement.[89] According to the Whitford Commission, a governmental body formed in 1978 to consider the law of copyright in Great Britain, PPL's policies with regard to musicians have been administered with common sense and an aim not to take too hard a line against licensees.[90]

With regard to radio licensees, PPL accomplishes its policy of protecting the interests of live musicians and recording artists by limiting the amount of "needle time" allowed in the license.[91] Needle time is the amount of air time which a radio station devotes to the playing of phonorecords. PPL's right to control needle time derives from the statutory

81. *See* WHITFORD, *supra* note 60, at 102.

82. Brand, *supra* note 78.

83. *Id.*

84. 1956 Copyright Act § 27(3). Thus, complaints by PPL licensees regarding the imposition of conditions, such as the requirement to employ live musicians, are settled by the PRT. *See, e.g.*, Reditune v. Performing Rights Soc'y [1981] F.S.R. 165, *reported in* [1981] C.L.Y. 324.

85. 1956 Copyright Act § 23(1).

86. 1956 Copyright Act § 24(1). This also applies to radio broadcasters.

87. The initial fee for filing a petition is only six British pounds, half of which is refundable if there is no hearing. Although a party may be represented by counsel, this is not required. *See* WHITFORD, *supra* note 60, at 102.

88. *See* MCFARLANE, *supra* note 45, at 136. The PRT's decisions are not published.

89. Brand, *supra* note 78.

90. *See* WHITFORD, *supra* note 60, at 102.

91. Brand, *supra* note 65.

right of the copyright owner of a sound recording to authorize the broadcasting of the recording.[92]

PPL's dealings with the BBC date back to the 1930's. These dealings began as a two-pronged matter governed by the use of gramophone records on the air and the relationship between PPL and the musicians' union.[93] The union's concern over record use on the air arose from the fact that, at the time, a large number of orchestras depended upon the BBC for their existence.[94] The union saw recorded music as a threat to these musicians and instituted the policy of limiting needle time to avert the threat. Today, the BBC employs hundreds of musicians. It still runs five in-house orchestras and employs outside orchestras like the London Symphony to do special programs.[95]

PPL's control of needle time was first challenged in the celebrated *Manx Radio*[96] case decided by the PRT in 1964. In that case, PPL had offered to issue a license to the Manx radio station on condition that not more than one-fifth of its broadcasting be devoted to the playing of phonorecords in PPL's repertoire.[97] Manx objected and petitioned the PRT for greater needle time on the ground that PPL's terms were unreasonable.[98] The PRT ruled that Manx's needle time be increased to half of its total broadcast time.[99]

However, the decision also contained concessions to PPL. Specifically, it called for increased royalty payments during the second to fourth years of the license.[100] The PRT also observed that when the license was to be renewed, it would be a matter of interest to the PRT to inquire into "the amount of help" which Manx had given to live musicians, either by

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92. 1956 Copyright Act § 12.

93. *See Counting Up Copyright Costs*, Musicians Weekly, Mar. 1985, at 6, col. 1 (statement of Anthony Jennings, BBC legal adviser).

94. Brand, *supra* note 78.

95. *See* HEARINGS, *supra* note 2 (statement of E. Fleishman, Los Angeles Philharmonic). In 1984, the BBC spent more than six million British pounds on salaries for its in-house orchestras. *See* Musicians Weekly *supra* note 93.

96. Performing Right Tribunal dec. 17/64 (Mar. 1965), *reported in* STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 149 (1983).

97. WHITFORD, *supra* note 60, at 103.

98. *Id.* The BBC and the musicians' union intervened, as they are permitted under Performing Right Tribunal rules. STAT. INST. 1965, No. 1506. The BBC contended that Manx should not enjoy greater needle time than was allowed the BBC, while the union intervened on the ground that any extension of needle time would damage the interests of live musicians. For the full text of the PRT rules of 1965, see COPINGER & SKONE JAMES, COPYRIGHT 825-46 (12th ed. 1980).

99. WHITFORD, *supra* note 60, at 103.

100. The beginning royalty was fixed at eight percent of the station's net yearly revenue from advertising. STEWART, *supra* note 96, at 149.

direct employment or by the promotion of their interests on the island.[101] When, in 1980, the PRT again considered licenses to broadcast phonorecords, this time for an association of nineteen independent commercial radio stations, it largely reaffirmed its findings in the *Manx* decision.[102]

It should be noted, however, that opposition to PPL's control of needle time appears to be growing and the association has submitted certain points to the High Court in Britain for final determination.[103] The broadcasters argue that the high cost of operating a successful radio station is made higher by PPL's policy, which undercuts the station's ability to attract audiences and generate revenue.[104]

By virtue of PPL's licensing policy, commercial radio in Great Britain today devotes not more than half its air time to the playing of phonorecords. In the United States, where no such restrictions exist, the typical commercial station devotes approximately seventy-five percent of its programming to the playing of recorded music.[105]

THE NEED FOR PROTECTION

PPL and the musicians' union defend their licensing policies as necessary to protect the livelihood and, ultimately, the existence of the live musical professional.[106] They point out that sound recordings offer an extremely cheap and convenient method for the consistent presentation of performances by the most proficient musicians; performances that can be reproduced with incomparable sound quality.[107] They argue that without the imposition of reasonable restrictions on the introduction of sound recordings for public entertainment, employment opportunities available to musicians, especially those at the grass roots level, would be seriously reduced and in some cases entirely eliminated.[108] In support of their argument, the musicians' union points out that in the absence of such control:

> . . . musical employment has virtually disappeared from radio

101. *Id.*

102. Association of Ind. Local Radio Contractors v. Phonographic Performance Ltd. and Musician's Union. Performing Right Tribunal dec. (1980), *reported in* STEWART, *supra* note 96, at 149.

103. Brand, *supra* note 78.

104. *See* Musicians Weekly, *supra* note 93.

105. *See* HEARINGS, *supra* note 2 (statement of Jack Golodner, director of department for professional employees of the AFL-CIO).

106. *See* WHITFORD, *supra* note 60, at 103.

107. *See* PHONOGRAPHIC PERFORMANCE, *supra* note 67.

108. *Id.*

> in the U.S., and that musicians in other countries are expressing grave doubts about the future of their profession as a result of the erosion of employment opportunities by recorded music.[109]

PPL's arguments are most convincing in justifying its policy of requiring club owners to employ a reasonable ratio of live musicians whenever possible. Just as PPL has admonished, employment opportunities for live musicians in the United States today are extremely limited and competition for a "gig" is fierce. According to the manager of one prominent San Francisco club, "Bands are begging us for gigs from the day they start being a band. There are 500 bands that want to be on every show I book. At least fifty will call me once a week."[110] This lack of opportunity forces bands to perform for free and even to pay club owners for the chance to perform.[111] Surprisingly, club owners complain that even under these circumstances, it is often unprofitable to produce live shows.[112] This is due to the fact that a live show requires the employment of various support personnel such as equipment, stage, light and sound managers, whereas a record format requires only a disc jockey. In addition, there are extra maintenance expenses and risks. Perhaps most significantly, the quality of live performances is inconsistent and audience response is difficult to predict.

It is perhaps more difficult to understand how PPL justifies its policy with respect to radio licensees. While it is true that elimination of control would be likely to reduce the amount of direct employment for musicians performing live on the air, the publicity and exposure that greater needle time would afford to recording artists would, arguably, offset this loss. However, any increase in needle time is likely to be eaten up by the playing of music by successful artists, while the emerging artist most in need of exposure would continue to be ignored.[113]

To meet the growing opposition to PPL's control of needle time and still accomplish the purposes behind the policy, PPL could replace the policy with affirmative requirements, like those imposed upon discotheque licensees, to preserve a reasonable ratio of air time for live per-

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109. *See* WHITFORD, *supra* note 60, at 102.

110. Fong-Torres, *supra* note 1, at 19, col. 1. (statement of Queenie Taylor, manager of Wolfgang's nightclub in San Francisco, California).

111. *Id.* at 17, col. 1 (statement of an unidentified San Francisco club manager).

112. *Id.* at 19, col. 2 (statement of Bobby Corona).

113. *See* Hayes, *supra* note 5 at 136-37. Based on statements by the American recording industry in 1975, Hayes points out that a "top forty" radio station usually adds only five or six new songs to its program play list each week, whereas about 900 new songs are released weekly by the recording industry.

formances and to devote a reasonable amount of their increased needle time to records by "emerging artists."

Regardless of the form in which they are cast, PPL's policies with regard to musicians are supported by powerful ethical, social and economic considerations which argue for their implementation in the United States. Requiring American radio and discotheque operators to contribute to the support of the profession on which their output depends is not unreasonable. America has a stake in the continued existence and vitality of the live musical professional. Policies like those administered by PPL in Great Britain would increase employment opportunities for musicians in the United States, thereby attracting more people into the profession in addition to discouraging others from quitting. Perhaps most compelling, the policies offer potential economic benefits for the American record industry.

Critics of these policies could argue that any attempt at such regulation in the United States would constitute an impermissible intrusion upon our system of free enterprise and would violate the first amendment. They could argue that the right of a broadcaster or club owner to choose its programming is protected speech and that policies like those administered by PPL would unconstitutionally interfere with that speech.[114] In response, the United States Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting*[115] and evolving case law recognizing a common law "right of publicity,"[116] support the notion that first amendment rights may be properly limited where it is necessary to protect a person's pecuniary interest in his or her performances. This body of law validates the balancing of interests in favor of extending protection to performers over first amendment challenges.[117]

POSSIBLE SOLUTIONS: THE PERFORMERS' PROTECTION ACT

This leads to the final and perhaps most difficult question: how can these policies be implemented in the United States? One method would be to grant a performance right in sound recordings, through copyright, for the benefit of producers and recording artists.

This would be a generally favorable idea. However, past attempts to

114. *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); Writers Guild of Am. v. Federal Communications Comm'n, 423 F. Supp. 1064, 1140 (C.D. Cal. 1976); American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953).

115. 433 U.S. 562 (1977).

116. *See, e.g.*, Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 608 P.2d 425, 160 Cal. Rptr. 323 (1979).

117. *See* Urwin, *supra* note 5, at 32-34.

establish performance rights do not lead proponents to be sanguine about the prospects of approval from Congress. In addition, legislation proposed toward this end has not proven to be free of defects. For example, the latest bill, H.R. 997, has been criticized for chiefly aiding performers of popular music while promising little or no help for those performing less popular music—those who are most in need of assistance.[118] Another criticism is the bill's failure to distinguish between those types of performance which are "artistic" and thereby entitled to copyright and those which are merely "reproductive" and thus do not qualify as "original works of authorship."[119]

Despite the defects in reform bills proposed to date, the idea of performance rights in records remains a good one. One of the advantages of recognizing the right is that it would enable the United States to ratify the Rome Convention, an international convention established in 1961 to protect performers, producers of phonograms and broadcasting organizations.[120] This would entitle United States recording artists and producers to collect foreign royalties from the performance of their sound recordings in countries which recognize the right.[121]

In the meantime, legislation designed to accomplish the purposes underlying PPL's policies with regard to musicians in Great Britain could be introduced in the United States. The legislation would authorize the imposition of conditions upon non-exempt commercial users of phonorecords for the protection of performing musicians and recording artists. Such a Performers' Protection Act ("PPA") would embody PPL's policy of requiring club owners and other similar public utilizers of music to put on a reasonable ratio of live music whenever possible. Exemptions for certain private and non-commercial users could be fashioned along lines similar to the statutory exemptions to copyright infringement of a musical work contained in section 110 of the 1976 Copyright Act.[122] In addition, guidelines modeled after PPL's common sense administration of its requirements would allow still other users who are unable to comply to avoid the requirements.[123]

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118. *Id.* at 57.

119. *Id. See also* 17 U.S.C. § 102 (1982).

120. *See* COPINGER & SKONE JAMES, *supra* note 98, at 370. The international accord for the protection of literary and artistic works found in the Paris Act also makes clear that the public performance of a work by gramophone records is protected by The Berne Convention under Article 13(1). *Id.* at 578-79.

121. It was estimated in 1978 that these potential foreign royalties were approximately $13 million. *See* HEARINGS, *supra* note 2 (statement of L. Weiner, special assistant for cultural resources to the Secretary of Commerce).

122. *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

123. *See supra* text accompanying notes 76-90.

With regard to radio broadcasters, the PPA would require stations to devote a reasonable ratio of needle time to the playing of phonorecords by "emerging artists." Artists could be certified for this purpose by the administrative bodies to be discussed below.[124] In addition, radio stations might be required to devote a reasonable ratio of air time to live broadcasts and interviews with musicians. Exceptions would be available for non-profit organizations and for stations programming non-musical material. These exceptions could be modeled on the 1976 Copyright Act's exemptions to copyright infringement of a musical work used in connection with non-commercial broadcasting.[125]

The PPA could be administered by United States performing right organizations in conjunction with the American Federation of Musicians ("A.F. of M."). These organizations already license the performance of copyrighted music in public.[126] They police unlicensed performances and assist their members in enforcing copyright violations.[127] Difficult determinations and classifications, such as what constitutes a reasonable ratio of live music for a given user and who are "emerging artists," could be made by the A.F. of M. To oversee the administration of the PPA, the jurisdiction of the Copyright Royalty Tribunal could be extended to include powers like those exercised by the PRT in Britain.[128]

Similar to the concept of performance rights in sound recordings, the PPA speaks to the problem of inadequate protection for performers under existing law. Unlike the concept of performance rights, which relies upon the direct subsidization of performers through the payment of royalties, the PPA is predicated upon a system of self-help for performers to be accomplished by increasing opportunities for employment and exposure which would be available to them. Perhaps this difference could be used to convince the National Association of Broadcasters not to oppose the PPA as vehemently as it has fought against performance rights in records.

The strongest objections to the PPA are likely to come from club owners who would probably prefer to pay a flat annual fee in exchange for unrestricted record use. They would argue that the PPA's requirement to employ live musicians would increase their overhead costs to a

124. *See infra* text accompanying notes 126-128.

125. 17 U.S.C. § 118 (1982).

126. *See* BROWN, *supra* note 18, at 407.

127. *See, e.g.*, Sailor Music v. Gap Stores, Inc., 668 F.2d 84 (2d. Cir. 1981).

128. *See supra* text accompanying notes 84-90. For a detailed discussion of the advantages of an agency like the PRT over existing judicial enforcement in the United States, see Comment, *Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation*, 72 CALIF. L. REV. 103 (1984).

point where many would be forced out of business, thereby reducing employment opportunities for musicians in the long run. In response to these objections, there is no evidence to indicate that the imposition of PPL's policies in Great Britain in the 1950's has led to a decline in the number of clubs operating since then.[129] In fact, because PPL recognized the symbiotic relationship between club owner and performing musician, it administers its requirements according to a club's ability to comply.[130]

To overcome opposition, political success for the PPA would depend upon the ability of the American music industry to unify in a concerted lobbying effort. In this regard, the major record companies are the crucial actors; but they are likely to question the value to them of support for the PPA. Requiring broadcasters to reserve some needle time for the playing of music by emerging artists would benefit smaller, independent record companies at the expense of the major labels. In addition, requiring club owners to employ live musicians would cut into the amount of exposure for major record companies' products. Finally, these companies would likely assert a vested interest in any legislation designed to benefit performers and recording artists and would prefer to continue to pressure Congress for performance rights in records, which would benefit them more directly. As pointed out above, the chances of getting this type of legislation passed are slim, and in any event the PPA would not duplicate or undermine a performance right. Rather, as in Britain, it would work with the right to provide extra protection for performers and emerging recording artists.

In direct response to the questions raised on behalf of the major record companies, the PPA would benefit American producers, both big and small, over the long run. Many record companies actively solicit new talent. Although this effort is international in scope, companies typically rely on talent available at the local level.[131] When an act is "discovered" by a record company, the act is signed to a standard producer's contract.[132] Because the unproven act has little or no bargaining power, the producer's contract reflects terms which are unilaterally favorable to the producer.[133] Once a band achieves success, the terms become more

129. *See* WHITFORD, *supra* note 60, at 102.

130. *See supra* text accompanying notes 76-83.

131. Interview with Patrick Clifford, artist and repertoire agent for Epic Records (Apr. 10, 1985).

132. Interview with Edward Rubin, Professor of Law at Boalt Hall School of Law, University of California, Berkeley, (Mar. 14, 1985).

133. *See, e.g.*, Motown Record Corp. v. Superior Court, 155 Cal. App. 3d 482, 202 Cal. Rptr. 227 (1984).

balanced.[134]

Since the 1950's, British music has enjoyed a prominent position in the world market.[135] The breakthrough came with the success of The Beatles, who occupied the first five places in the "American Top 100" in April 1964.[136] The Beatles have been followed by a long list of British rock stars like The Rolling Stones and David Bowie, who have continued British prominence into the 1980's.[137]

This is not to say that Great Britain has achieved its prominence solely by virtue of PPL's licensing policies. Other factors such as widespread unemployment and heightened social awareness have been advanced as explanations.[138] However, PPL's policies, especially insofar as they reflect acceptance in Great Britain of the value of encouraging the livelihood of musicians, are significant. Ironically, Britain has achieved this success at America's expense.[139] The United States is, by far, the largest consumer of music in the world today and the British music industry enthusiastically cashes in on that consumerism.[140] If the American music industry could cash in on its own market in proportions which more closely reflect this country's enormous consumerism, then American producers would benefit.

By fostering the profession of the performing musician in the United States, the PPA would facilitate this result by enlarging the pool of potentially successful recording artists available at the local level. Although American companies are free to sign a British act, that act is likely to be under contract with a British company and would have to be bought out on terms less favorable than those which could be imposed upon a newly discovered act.

Additional possibilities exist with lobbying groups like a songwriter-public policy alliance, which could be formed to sponsor the PPA. However, without the muscle of the major producers, the chances of success

134. Rubin, *supra* note 132.

135. *See* MCFARLANE, *supra* note 45, at 153.

136. *Id.*

137. For example, one British group that recently topped the record charts in the United States is Culture Club, whose first album, "Kissing to be Clever," boasted three top ten hits, the first such occurrence since the Beatles' debut album. Collins, *Boy George, He Wears the Pants in Culture Club*, Rolling Stone, June 7, 1984, at 13, col. 1.

138. *Id. See also* Weissong, *State of the Arts*, Music Calendar, Jan. 1985, at 7, col. 1 (statement of Paul Turpin, professional musician).

139. *See* BOOKER, THE NEOPHILIACS 38 (1969).

140. For example, the two major U.S. organizations, ASCAP and BMI, are the largest single source of foreign royalties for members of the PRS. *See* Performing Right Society, *supra* note 50 at 73. In 1983, roughly thirty percent of the total income of PRS came from overseas royalties. *Id.* at 8.

would be limited. Still another alternative would be to impose a tax on the sale of phonorecords, the proceeds of which could be used to subsidize club owners and radio broadcasters who comply with the policies. That part of the PPA which affects radio broadcasters alternatively could be pursued through the Federal Communications Commission. However, given the current climate in favor of deregulation in that agency, this option is unrealistic.[141]

Another alternative would be for ASCAP and BMI to institute the policies underlying the PPA without statutory authority through their current licensing. Unfortunately, this action would be vulnerable to attack on first amendment and antitrust grounds.[142] On the antitrust issue, BMI's and ASCAP's licensing policies have already been the subject of several major attacks. The Justice Department first investigated the societies in the early 1940's. This resulted in a consent decree, under which ASCAP and BMI still operate.[143] Twenty years later, the Columbia Broadcasting System alleged price fixing in an ultimately unsuccessful suit that lasted almost twelve years.[144] Recently, a successful class action was brought by television broadcasters in New York charging that the blanket licensing policies unreasonably restrained trade.[145] Even more recently, the licensing practices of BMI have come under attack again, this time by a Maryland tavern owner.[146]

CONCLUSION

Sadly, none of these proposals is likely to be embraced either by the American record industry or by Congress; the former because of its preference for short term profits over long term gains, and the latter because of the current climate in favor of deregulation and predictable opposition from the powerful National Association of Broadcasters. However, the program is mandated not only by social and ethical considerations, but also by strong economic arguments.

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141. *See* Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

142. For discussion of the first amendment issue, *see supra* text accompanying notes 114-117.

143. United States v. American Soc'y of Composers, Authors and Publishers, (S.D.N.Y. 1941), reported in 1940-1943 TRADE CASES 56, 104.

144. Columbia Broadcasting Sys., Inc. v. American Soc'y of Composers, Authors and Publishers, 400 F. Supp. 737 (S.D.N.Y. 1975) *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, (1979), *aff'd on remand*, 620 F.2d 930 (2d Cir. 1980), *cert. denied* 450 U.S. 970 (1981).

145. *Buffalo Broadcasting*, 546 F. Supp. at 274.

146. *See* Sobel, *Legal Briefs*, Hollywood Reporter, Mar. 5, 1982, at 14, reported in 29 BULL. COPYR. SOC. 702 (1982).

The problem of how to protect the legitimate interests of performers has plagued American lawmakers for nearly half a century. Fortunately, a study of comparative copyright law yields a solution. Great Britain has long recognized the importance of protecting the livelihood of its musicians and has enjoyed the fruits of its wisdom. It is time for the United States to recognize and take steps to develop one of its greatest national resources, American music.